Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the State of Minnesota	)	
for a Declaratory Ruling Regarding the	)	CC Docket No. 98-1
Effect of Sections 253(a), (b) and (c)	)	
of the Telecommunications Act of 1996 on	)	
an Agreement to Install Fiber Optic	)	
Wholesale Transport Capacity in State	)	
Freeway Rights-of-Way	)	
	)	

REPLY COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

Teleport Communications Group Inc. ("TCG") hereby replies to comments filed in the above-captioned proceeding. The participants filing analytical comments uniformly opposed Minnesota's request that the Commission declare an exclusive agreement to install fiber optic wholesale transport capacity over the state freeway does not violate Section 253 of the Communications Act. The parties' extensive evaluation of the contract clearly shows that such an exclusive arrangement would, in effect, prohibit the offering of telecommunications service. The proposed exclusive contract is not saved either under Section 253(b) or 253(c) of the Act because it is not necessary to protect the public safety and welfare and would lead to management of rights-of-way on a non-competitively neutral basis. Therefore, the Commission should deny the Petition.

I. THE EXCLUSIVE ARRANGEMENT HAS THE EFFECT OF PROHIBITING THE OFFERING OF TELECOMMUNICATIONS SERVICES

Commenters rejected Minnesota's efforts to distinguish the provision of "infrastructure" from the offering of a telecommunications service, such that the exclusive arrangement must be analyzed in the context of Section 253(a). Significantly, the Communications Act does not distinguish between wholesale and retail services in its definition of "telecommunications services."[1] MFS flatly asserts that "[a]t no point in the past has the Commission distinguished between placing telecommunications infrastructure and the ensuing step of offering telecommunications services,"[2] as argued in the Petition.

In this regard, the Minnesota Telephone Association ("MTA") correctly stated that the Agreement has the effect of prohibiting the provision of telecommunications service by restricting to all but one entity the use of "the most direct and least costly routes between communities along the freeway rights-of-way."[3] Because fiber is location specific, it is not sufficient that other sources of fiber exist other than along freeway rights-of-way, as claimed by the State.[4] Carriers will be unduly restricted in their offering of service because the State's exclusive policy increases costs to carriers.[5]

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1. See MFS at 9-10.
2. Id.
3. Minnesota Telephone Association ("MTA") at 2, 11-18.
4. Id. at 10.
5. Id. at 29-30.

Similarly, MCI disputes the State's narrow view as to what constitutes prohibiting the ability of carriers to provide telecommunications services. In this case, the proposal grants Developer a distinct competitive advantage over competitors. Developer, because it is neither a state or local government, would not be subject to regulatory oversight pursuant to Section 253, even though Developer would have exclusive control over scheduled placement of facilities.[6] Under these circumstances, the Agreement has the effect of prohibiting the ability of other carriers to offer telecommunications services. In fact, ALTS urges the Commission to extend the analysis presented by these facts and find that any agreement to which a state or local government is a party that "forecloses the ability of any carrier to provide service regardless of the nature of the agreement" is a per se violation of Section 253(a).[7]

The parties addressing this issue uniformly conclude that the permission to a single entity for facilities placement over freeway rights-of-way prohibits or has the effect of prohibiting the offering of telecommunications service. Thus, the Commission should find that the exclusive arrangement violates Section 253(a) of the Act.

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6. MCI at 2-7.

7. ALTS at 9-10; see also KMC at 2 (stating that the failure to preempt in response to the petition could result in the implementation by other states of similar arrangements which would have a detrimental effect on competition); MFS at 11-13.

II. THE EXCLUSIVE ARRANGEMENT DOES NOT CONSTITUTE COMPETITIVELY NEUTRAL MANAGEMENT OF RIGHTS-OF-WAY AND IS NOT NECESSARY TO PROTECT THE PUBLIC SAFETY AND WELFARE

As TCG described in its Comments, a restriction on the provision of telecommunications services may be permissible only in cases where a state or local authority demonstrates that its prohibition is necessary to protect the public safety and welfare and is competitively neutral (Section 253(b)) or exercises its authority to manage public rights-of-way on a nondiscriminatory basis (Section 253(c)). Commenting parties have persuasively demonstrated that the exclusive arrangement meets neither of these statutory requirements.

Parties rejected on a number of grounds the State's argument that its exclusive agreement is permissible under Section 253(b), which permits states to impose competitively neutral requirements necessary to protect the public safety and welfare. As ALTS correctly notes, the State has articulated no specific safety concerns or justified why a ten year exclusive arrangement is necessary to protect the traveling public and transportation works on rights-of-ways.[8] Ameritech argued also that collocation under the Agreement is a poor substitute for ownership and control of a facility and thus, is not competitively neutral.[9] Cost savings and administrative convenience are not appropriate justifications for a violation, because the requirement imposed must "necessary," not merely

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8. ALTS at 16; see MTA at 43-48 (citing FHWA Guidelines, AASHTO policy, and state policies).

9. Ameritech at 3.

"reasonable" or "efficient" for the State.[10] An Agreement that limits access to a single entity simply cannot be characterized as competitively neutral when the only available alternatives fall short of the right-of-way from which all other entities are excluded.[11]

Similarly, Minnesota has failed support its contention that the exclusive arrangement is a permissible exercise of its authority to manage public rights-of-way under Section 253(c). GTE accurately summarizes the arrangement as an abdication of the State's management authority "in return for the monetary benefit of the consortia's fiber capacity."[12]

III. NO COMMENTER SUPPORTING THE PROPOSAL HAS OFFERED A REASONED LEGAL ANALYSIS JUSTIFYING THE EXCLUSIVE ARRANGEMENT

It is noteworthy that the only supporters of the Minnesota proposal are other state transportation departments or similarly interested parties.[13] While it is

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10. MTA at 40-43.

11. See KMC at 5-6.

12. GTE at 12; see also MCI at 7-8.

13. See, e.g., Letters filed by Alaska Department of Transportation ("DOT") and Public Facilities (filed February 17, 1998), American Association of State Highway and Transportation Officials (with adopted resolution in support) (filed January 21, 1998), Butler County (OH) Transportation Improvement District (filed March 9, 1998), Indiana DOT (filed March 9, 1998), Minnesota Intergovernmental Information Systems Advisory Council (filed February 3, 1998), Mississippi DOT (filed February 12, 1998), Montana Department of Administration - Information Services Division (filed February 9, 1998), Maine DOT (filed February 11, 1998) (also reporting that it is preparing to solicit applications for the installation of a

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obvious that these filing parties would benefit from a decision favorable to Petitioners, none of the parties have offered any rationale explaining why the exclusive arrangement does not present a violation of Section 253(a). Indeed, these parties' attempts to justify such exclusive telecommunications facilities arrangements on public interest grounds have been squarely countered by several Minnesota Legislators.

Specifically, three chairpersons of Minnesota House of Representatives committees — Committee on Governmental Operations, Committee on Transportation, and Committee on Financial Institutions and Insurance — have expressed concern that the Minnesota Agreement was entered with little, if any, legislative scrutiny.[14] The Legislators suggest that legislative policy jurisdiction was usurped by the executive branch; for example, the contract term far exceeds those typically found in state government contracts, and the contract includes off-budget compensation to the Department of Transportation in the form of $5 million in computer equipment. The Legislators are also concerned with the DOT's acquiescence to take title to the communications system after 30 years, given that

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13.(...continued)
longitudinal fiber optic facility in a portion of interstate highway, imposing terms similar to the Minnesota Agreement), Wilbur Smith Associates (filed March 2, 1998), Wisconsin Department of Administration - Bureau of Telecommunications Management (filed February 9, 1998). The California DOT requested an extension of time to comment because it is "actively reviewing its policy regarding freeway longitudinal easements for telecommunications facilities." Letter (filed February 4, 1998).

14. Letter of Rep. Phyllis Kahn, Rep. Jean Wagenius, and Rep. Irv Anderson (filed February 9, 1998).

the Legislature has never authorized public ownership of the system, or assessed any associated liability and financial costs. Finally, the Legislature was excluded from the process to designate the communities to be served by the system, and it believes that significant Minnesota areas have been excluded.

Thus, even those public policy interests cited in the Minnesota Petition and those that may be inferred from the state agency letters are countered by competing state public policy concerns that were not even vetted in a state forum prior to the adoption of the exclusive agreement. Not only does the Minnesota arrangement present serious legal issues, but it appears that the FCC has been presented with a "state policy" issue that does not even represent the unified view of Petitioners' state. In this regard, Petitioner has failed to provide any justifiable rationale for the Commission to grant its request for declaratory ruling.

For these reasons, the Commission should deny the Minnesota Petition and declare that exclusive rights-of-way arrangements violate Section 253(a) and are not otherwise permitted under Sections 253(b) and 253(c).

Respectfully submitted,

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Dated: April 9, 1998

CERTIFICATE OF SERVICE

I, Dottie E. Holman, do hereby certify that a copy of the foregoing Reply Comments of Teleport Communications Group was sent by hand-delivery and first-class mail, postage pre-paid, as indicated, this 9th day of April, 1998, to the following:

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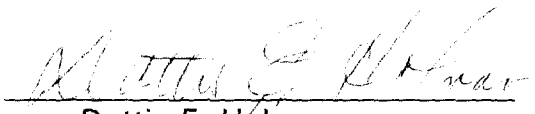

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* First-Class Mail